

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 837

THE UNITED STATES, PETITIONER,

vs.

JEFF W. MOORMAN AND JAMES C. MOORMAN,
CO-PARTNERS, DOING BUSINESS AS J. W. MOOR-
MAN & SON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 — In the Court of Claims of the United States

No. 46439

JEFF W. MOORMAN AND JAMES C. MOORMAN, CO-PARTNERS, DOING
BUSINESS AS J. W. MOORMAN & SON, PLAINTIFFS

versus

UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed May 23, 1945

Come now the above named plaintiffs, Jeff W. Moorman and James C. Moorman, co-partners doing business as J. W. Moorman & Son, and respectfully show to the Court that this is an action to recover payment for work done by the plaintiffs for and on behalf of the United States; said plaintiffs having a contract with the United States, and the controversy arises as to whether the work which plaintiffs were required to do by the United States was within the terms of said contract.

2 The plaintiffs are citizens and residents of Muskogee, Oklahoma, and are engaged in the general contracting business, and they have at all times borne true allegiance to the Government of the United States, and have not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against this Government.

That the claim and cause of action involved herein accrued within six (6) years before the filing of this petition.

Plaintiffs state that heretofore and on the 4th day of April, 1942, there was prepared by the United States Engineer Office a contract letter which was accepted by the plaintiffs herein on April 7, 1942, whereby the plaintiffs contracted for the grading at the site of the Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma. A copy of said contract letter is hereto attached, marked Exhibit "A" and made a part hereof

Subsequent thereto, although made to date as of April 3, 1942, formal Contract No. W-957-eng-851 was entered into between the parties for "Grading Plant Site," "Place, Oklahoma City Aircraft Assembly Plant, approximately 7 miles Southeast of Oklahoma City, Oklahoma," under which contract Article I reads as follows:

"ARTICLE I. Statement of work—The contractor shall furnish the materials, and perform the work for grading the site of the Oklahoma City Aircraft Assembly Plant, consisting of approximately 1,000,000 cubic yards of earthwork, approximately seven miles southeast of Oklahoma City, Oklahoma in accordance with the specifications attached hereto and made a part hereof, for the consideration of twenty-four cents (\$0.24) per cubic yard of grading (earth-

work), satisfactorily completed and accepted by the Government in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for grading of Plant Site, Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, as modified by Addendum No. 1, dated March 31, 1942, and the drawings referred to in paragraph 1-15 of the specifications.

"The work shall be commenced as provided for in paragraph 1-05 of the specifications attached hereto and made a part hereof, and shall be completed within the time stated in the same paragraph of said specifications, with the provision that the entire work shall be completed within seventy-five (75) days after the date of receipt of notice to proceed."

Attached to said contract and made a part thereof were the specifications, Section 1-02 of which reads as follows:

"LOCATION—The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N., Range 2 west (2W) of the I. M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma."

Section 1-15 of said specifications reads as follows:

"DRAWINGS

(a) GENERAL—The work shall conform to the following drawings entitled "Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma," with subjects and file numbers as follows:

SUBJECT	FILE NUMBER
Location Map	GI
Plot Plan	G3

4 "The above drawings form a part of these specifications. The originals are on file at the office of The Austin Company, Skirvin Tower Hotel, Oklahoma City, Oklahoma."

Section II (2) (e) reads as follows:

"Conflicts—

"(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

"(2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall

govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

"(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern."

A copy of said contract (with immaterial parts omitted) is attached hereto, marked Exhibit "B," and a copy of said specifications (with immaterial parts omitted) is attached hereto, marked Exhibits "C". A copy of said location map GI is not attached hereto for the reason that Plaintiffs do not have a copy of same, but same is available to this Court, as will be hereinafter noted.

Thereafter plaintiffs proceeded with their performance of said contract in strict compliance with the terms and provisions of the contract and specifications, and completed same.

Plaintiffs further state that subsequently and on or about June 17, 1942, plaintiffs were directed to grade the area (known as taxiway) outside the location of the plant site, which area was on the site of the Oklahoma City Air Depot; another project.

Plaintiffs at first refused so to do, and insisted upon written demand that said work be done. A copy of said written demand is hereto attached, marked Exhibit "D" and made a part hereof. Plaintiffs acceded to this request, contending, however, that same was not within the purview of the contract and specifications. A copy of said assent is attached hereto, marked Exhibit "E" and made a part hereof. Plaintiffs reiterated their position in letters of June 22, 1942, and July 6, 1942, copies of which letters are attached hereto, marked Exhibits "F" and "G", and made a part hereof. Plaintiffs thereafter filed a claim for additional payment, which claim was denied under a Findings of Fact letter dated October 1, 1942, a copy of which is hereto attached and marked Exhibit "H", and in this letter the United States Engineer made the following statement and admission, "The areas designated on the plans as Taxiway Proposed and Entrance D are not within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications."

Within the period provided for in the contract and on October 8th, 1942, plaintiffs filed their answer to said Findings of Fact letter, a copy of which is hereto attached and made a part hereof, marked Exhibit "I". Thereafter said matter was filed before the War Department Board of Contract Appeals under BCA No. 167, and on January 20, 1944, said appeal was denied.

Plaintiffs further state that by virtue of the provisions of Section 15 of the contract, all disputes concerning questions of fact shall be decided by the contracting officials, but requires the contractor to proceed with the work as directed. That the ques-

tion involved, as disclosed by plaintiffs' petition, was a question of law, and that the Engineer has no jurisdiction under the terms of the contract to determine questions of law.

Plaintiffs further show that under Section 2-16 of the specifications there is a similar provision and requires the contractor to continue the work and sets forth the manner of appeal.

Plaintiffs further show that the matter was on appeal, and not as trial *de novo*, and that the Judge Advocate General of the United States has rendered an opinion that said Board of Contract Appeals has no jurisdiction on matters of this nature wherein the question is one of law rather than of fact. Op. J. A. G.-S. P. J. G. C. 1943/2811, 2/13/43.

Said plaintiffs state that they are the sole owners of said claim and that no assignment or transfer of the same or any part thereof or interest therein has been made.

Plaintiffs further state that by virtue of a renegotiation agreement, dated April 7, 1944, it was agreed that in the event the plaintiffs recover in excess of \$142,330.00 on the claims asserted under said contract, such amount in excess of said sum will constitute profits which should be eliminated and recovered by the United States.

There has been recovered on said claims the sum of \$24,413.49.

7 Plaintiffs further state that the grading which they were required to do on the taxiway, which is the area outside the site of the Oklahoma City Aircraft Assembly Plant, and not within their contract, was done at a greater cost and that the total yardage therein was 298,873 yards. That plaintiffs are entitled to payment of their claim for same of 84¢ per yard, of which 24¢ per yard has been paid, leaving a balance due these plaintiffs of \$179,323.80, after allowing all charges, credits and offsets, except as regards the renegotiations agreement above set forth.

Wherefore, plaintiffs respectfully pray that this Honorable Court find and adjudge that the United States of America is indebted to them in the sum of \$179,323.80, with interest, by reason of the work done by the plaintiffs at the insistence and request of the United States of America, and which work plaintiffs contend was not within the purview of the contract, and that the Court enter a judgment therefor against the United States of America and order said sum paid.

SPIERS & BODOVITZ,
By V. J. BODOVITZ,
Attorneys for Plaintiffs.

Duly sworn to by V. J. Bodovitz. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

War Department
U. S. ENGINEER OFFICE
P. O. Box No. 61
416 Wright Building
Tulsa, Oklahoma

April 4, 1942

Refer to File No.
O.A.A.P. 316/93
Ref. A-5
Subject: Contract No. W-957-eng-852.

Received Aircraft Assembly Plant, Oklahoma City, Okla., Apr.
6, '42 AM.

To: J. W. Moorman & Son
715 Wells Roberts Hotel
Oklahoma City, Oklahoma

Gentlemen:

1. The United States of America, acting through the undersigned Contracting Officer, hereby places an order with you that you shall furnish the material and perform the work necessary for the construction and completion of approximately 1,000,000 cu. yds. of grading (excavation) at the site of the Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with specifications, schedules and drawings, all of which are made a part hereof or which will be furnished to you prior to April 8, 1942. The work referred to shall be started on or before April 8, 1942, and shall be completed on or before June 22, 1942. The price for such construction work will be as agreed upon in accordance with negotiations held with you on April 2, 1942, such unit price being twenty-four cents per cu. yd. for the approximate quantity involved.

2. Funds for carrying out this construction work have been appropriated and are now available for use of the War Department under procurement authority Eng. 19360 P1-32 A.0141-03.

3. The Secretary of War finds that it is in the interest of the war effort that this work be not delayed awaiting the negotiation of a formal contract.

4. Pending the execution of such formal contract, each subcontract, orders for material, equipment, other expenditures, and any commitment made in furtherance of the performance of this contract, entered into by you for a sum in excess of \$2000 shall be subject to the prior written approval of the Contracting Officer.

5. It is contemplated that this contract will be supplemented by the execution of a formal contract between you and the United States of America following, in general, U. S. Standard Form, 10 No. 23, Revised. That contract will include an appropriate clause providing for the termination of the contract for the convenience of the United States of America. All applicable contract clauses required by Federal Laws, Executive Orders, and Army Regulations to be incorporated in such contracts are hereby incorporated herein by reference and will be incorporated in the formal contract and in all subcontracts hereunder.

6. Any claim arising under this contract and any contract supplementing it may be assigned pursuant to the terms of the Assignment of Claims Act of 1940 unless the subject-matter of this contract has been classified as secret, confidential or restricted, and any claims arising under this contract shall not be subject to reduction or not off for any indebtedness of the assignor to the United States arising independent of this contract.

7. In the event the United States of America is unable to negotiate with you a satisfactory contract to supplement this contract prior to April 20, 1942, this contract will terminate and you will be reimbursed for all costs incurred by you in connection with the performance of this contract plus such other sums as have actually been expended by you, in good faith, in settlement of all obligations, commitments and claims which you may theretofore have incurred, but in any event such payments shall not exceed the sum of \$240,000. Upon such payment title to all material, equipment, work in process, and all other things procured or produced by you in 11 the performance of this contract shall vest in the United States of America.

8. If the foregoing is acceptable to you, it is desired that you so indicate hereon and on the inclosed two copies of this letter and return the original and two copies to the Contracting Officer on or prior to April 8, 1942. Such acceptance will constitute this order a contract.

For the District Engineer:

Very truly yours,

Lt. Col., Corps of Engineers,
BRUCE D. RINDLAUB,
Executive Assistant.

Accepted April 7, 1942. J. W. Moorman & Son, (Name of Contractor). 715 Wells-Roberts Hotel, Oklahoma City, Oklahoma. By J. W. Moorman, partner. (Name and Official Title.)

EXHIBIT "B" TO PETITION

Contract No. W-957-eng-851

CONTRACT

(Construction)

U. S. Standard Form No. 23-Rev.

APPROPRIATION: 210/30141 Expediting Production of Equipment and Supplies for National Defense, 1940-43.

War, Engineer Department at Large,
U. S. Engineer Office,
Tulsa, Oklahoma

(Department)

J. W. Moorman & Son, Contractor

12 Contract for grading plant site. Amount, \$240,000.00 (approx.)

Place, Oklahoma City Aircraft Assembly Plant, approximately seven miles southeast of Oklahoma City, Oklahoma.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, are chargeable to procurement authorities below enumerated, the available balances of which are sufficient — cover the cost thereof.

Eng-19360 P101-10 A 0141-03

ANMB Preference A-1-a

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 3rd day of April, 1942, by THE UNITED STATES OF AMERICA hereinafter called the Government, represented by the contracting officer executing this contract, and J. W. MOORMAN & SON, a partnership consisting of Jeff W. Moorman and Jim C. Moorman of the city of Oklahoma City in the State of Oklahoma, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

13 ARTICLE 1. *Statement of work.*—The contractor shall furnish the materials, and perform the work for grading the site of the Oklahoma City Aircraft Assembly Plant, consisting of approximately 1,000,000 cubic yards of earthwork, approximately seven miles southeast of Oklahoma City, Oklahoma, in accordance with the specifications attached hereto and made a part hereof, for the consideration of twenty-four cents (\$0.24) per cubic yard of grading (earthwork), satisfactorily completed and accepted by the Government in strict accordance with the specifications, sched-

ules, and drawings, all of which are made a part hereof and designated as follows: Specifications for grading of Plant Site, Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, as modified by Addendum No. 1, dated March 31, 1942, and the drawings referred to in paragraph 1-15 of the specifications.

The work shall be commenced as provided for in paragraph 1-05 of the specifications attached hereto and made a part hereof, and shall be completed within the time stated in the same paragraph of the said specifications, with the provision that the entire work shall be completed within seventy-five (75) days after the date of receipt of notice to proceed.

ARTICLE 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract
14 the work shall be delivered complete and undamaged.

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall

excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work sub-surface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

ARTICLE 5. *Extras.*

ARTICLE 6. *Inspection.*

ARTICLE 7. *Materials and workmanship.*

ARTICLE 8. *Superintendence by contractor.*

ARTICLE 9. *Delays—Damages.*

ARTICLE 10. *Permits and care of work.*

ARTICLE 11. *Eight-hour law—Overtime compensation—Convict labor.*

ARTICLE 12. *Covenant against contingent fees.*

ARTICLE 13. *Other contracts.*

ARTICLE 14. *Officials not to benefit.*

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors.*

ARTICLE 17. *Rate of wages.*

ARTICLE 18. *Domestic preference.*

ARTICLE 19. *Nonrebate.*

ARTICLE 20. *Additional security.*

ARTICLE 21. *Definitions.*

ARTICLE 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto: See pages (8a), (8b), (8c), (8d), (8e), and (8f), hereof.

CONTRACT

ARTICLE 3. *Changes.*ARTICLE 9. *Delays—Damages.*ARTICLE 19. *Nonrebate.*ARTICLE 23. *Termination for Convenience of the Government.*

SPECIFICATIONS

2-26. *Accident Prevention.*

Paragraph 2-16. *Claims, Protests and Appeals*, hereof was deleted and the following substituted therefor:

"2-16. *Claims, Protests, and Appeals.*

17 (a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified, and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

"(b) All appeals from decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract."

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By BRUCE D. RINDLAUB,

*Lt. Col., Corps of Engineers,
Executive Assistant,
(Contracting Officer.)*

18

J. W. MOORMAN & SON,

By J. W. MOORMAN,

Contractor,

*Partner,
Wells Roberts Hotel, Okla. City, Okla.*

Two witnesses:

Eve Davis,
A. G. Franks.

This contract is authorized by the Third Supplemental National Defense Appropriation Act, 1942, approved Dec. 17, 1941. (Public No. 353, 77th Congress).

EXHIBIT "C" TO PETITION

WAR DEPARTMENT
U. S. ENGINEER AREA OFFICE
OKLAHOMA CITY, OKLAHOMA

Appropriation: 210/30141, Expediting Production of Equipment and Supplies for National Defense, 1940-1943.

Specifications for Grading of Plant Site, Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma.

SECTION I—SPECIAL PROVISIONS

1-01. *General*—These special provisions are a part of the specifications for this contract and shall be consulted in detail for instructions pertaining to this work.

1-02. *Location*—The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N, Range 2 west (2 W), of the I.M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma.

19 1-03. *Work to be Done*—

(a) The work provided for herein is authorized by the Third Supplemental National Defense Appropriation Act, 1942, approved December 17, 1941 (Public No. 353, 77th Congress).

(b) *Nature of Work*—The work to be done under these specifications includes the furnishing of all labor, tools, equipment, materials and supplies necessary for the grading of the plant site including the building sites, roads, aprons, taxiways, permanent parking areas, disposal plant site and all other building site areas shown on the plans, all in accordance with the plans and these specifications.

1-04. *Order of Work*—Work shall be carried on at the location, and in the sequence specified herein or as directed by the Contracting Officer. The work shall be constructed in every part in exact conformity with the location and limit marks established by the Contracting Officer. The grading work under this contract shall begin in the area designated for the temporary building sites and shall be prosecuted with the greatest possible speed. Work at the

north end of the plant site may be carried on concurrently and must be next in the order of work.

1-05. Commencement, Prosecution and Completion—

(a) *Commencement*—The Contractor will be required to commence the work under this contract within forty-eight (48) hours after date of receipt by him of notice to proceed.

SECTION I—SPECIAL PROVISIONS

1-12. Quantities—The following estimate of quantities is given only to serve as a basis of comparison of bids, and for determining the approximate amount of the consideration of the contract. The Contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 1-03 of these specifications, be it more or less than the amount herein estimated.

Item No.	Designation	Unit	Quantity
1	Grading (Excavation)	C.Y.	1,000,000

1-14. Work covered by Contract Price—The Contractor shall, for the contract price, furnish and pay for all materials, labor and all permanent, temporary, preparatory, and incidental work, furnish all accessories, and do everything which may be necessary to carry out the contract in good faith, which contemplates the completion of everything in good working order completed in accordance with the plans and these specifications.

1-15. Drawings—

(a) *General*—The work shall conform to the following drawings entitled "Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma", with subjects and file numbers as follows:

Subject	File Number
Location Map	G1
Plot Plan	G3

The above drawings form a part of these specifications. The originals are on file at the office of The Austin Company, Skirvin Tower Hotel, Oklahoma City, Oklahoma.

CONSTRUCTION CONTRACT

2-02. Definition of Terms—

(13) *Plans*—The word "plans" shall refer to the plans or drawings made a part of the contract and such additional detail drawings as are necessary for the proper execution and completion of

the work, although such additional plans and drawings may not be prepared until after the commencement of the work.

(15) *Specifications*—The written description of the materials, instructions for the installation of the materials and other information pertaining to the execution of the contract which are a part of the contract documents. The specifications may be altered by supplementary specifications or addenda which will become a part of the contract when issued.

2-03. *Intent of Plans and Specifications*—

(a) *General*—It is the intent of the plans and specifications to describe a completed work to be performed under this contract. Considerable latitude is allowed in these specifications in order that there may be no unfair discrimination against the builders of different styles and types of equipment. For this reason, no omission of any detail from the specifications shall release the Contractor from furnishing any materials or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal.

(e) *Conflicts*—

(1) In case of conflict between the plans and specifications, the specifications shall govern over the plans.

22 (2) In case of conflict between the standard articles of the contract and the plans and specifications, the plans shall govern over the contract and the specifications shall govern over both unless otherwise specifically stated in the contract.

(3) In case of conflict between the general provisions, and special provisions of the specifications, the special provisions shall govern.

2-16. *Claims, Protests and Appeals*—(Shown in amendment to contract).

SECTION III—TECHNICAL PROVISIONS
GRADING PLANT SITE

3-01. *General*—The special and general provisions bound herewith are a part of this contract and shall be consulted in detail for instructions pertaining to this work.

3-02. *Scope*—The specifications shall govern the grading of the temporary building sites, plant building sites, permanent parking areas, roads, taxiways, aprons, disposal plant site, and all other building sites and areas shown on the plans. The work shall include the furnishing of all labor, tools, materials, equipment and service necessary to perform all grading, grubbing, excavation, embankment and embankment compaction required to complete the grading in accordance with the plans and specifications.

3-03. *Clearing*—All areas shall be cleared of all logs, stumps, trees, brush, poles, fences, vegetation and other obstructions which will interfere with the construction of the plant, except such items

as may be designated by the Contracting Officer to be left in place.

23 3-04. *Grubbing*—

(a) *Embankment Areas*—All areas designated for embankment shall be grubbed, except that where the embankment is to be built to a height of three (3) feet above the ground, the stumps may be cut off at the ground line.

(b) *Excavation Areas*—All areas to be excavated shall be grubbed completely of all stumps and all roots of three-fourths ($\frac{3}{4}$) of an inch in diameter.

3-05. *Disposal of Cleared Materials*—Disposal of all materials except fences shall be by burning or other approved methods and shall be satisfactory to the Contracting Officer. Fence Wires shall be neatly wound on suitable reels, and the wire and such posts as are sound shall be stored in the vicinity of the work as directed by the Contracting Officer. All unsound posts shall be disposed of by burning or other approved methods.

3-06. *Stripping*—Top soil and vegetable matter from all graded areas shall be stripped to a depth of not less than six (6) inches, as directed by the Contracting Officer. The top soil shall be stock piled outside of the limits of construction as directed by the Contracting Officer and shall be preserved for use on unpaved areas after the grading has been completed.

EXHIBIT "D" TO PETITION

THE AUSTIN COMPANY

Engineers and Builders of Defense Facilities for the
WAR DEPARTMENT

Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma

June 17, 1942

J. W. Moorman & Son,
Aircraft Assembly Plant,
Oklahoma City, Oklahoma,

GENTLEMEN:

In accordance with your verbal instructions and your Contract Specifications, Section 1—Special Provisions, paragraphs 1-12 on Quantities, paragraphs 1-15 on Drawings, and Article 2 of your Contract, you are to proceed with the grading west of the depressed tracks and with all areas as shown.

Very truly yours,

THE AUSTIN COMPANY,
C. R. BREWER,

General Superintendent.

EXHIBIT "E"

Oklahoma City, Okla.

June 17, 1942

The Austin Company,
Oklahoma City Aircraft Assembly Plant,
Oklahoma City, Oklahoma,

Attention Mr. C. R. Brewer, General Superintendent

25 GENTLEMEN:

Acknowledging receipt of your letter of June 17th, 1942, requesting that we proceed with the grading west of the depressed tracks and all areas as shown.

We will do this work as requested; doing same, however, under protest.

It is our position that our contract, plans and specifications do not cover the grading called for.

Section 1-02 of the specifications lists the plant site to be graded and describes same, and the area now called for in your letter for grading is outside this location. Therefore it is our position that we do not have a contract covering this additional work called for.

Under Article 15 of the contract, as well as the amendment of the specifications, paragraph 2-16, we submit our protest as above and request that you promptly investigate our complaint and give us your decision in writing.

Yours very truly,

J. W. MOORMAN & SON,
By J. W. MOORMAN.

VJB-Mc.

P. S.—Neither your letter nor the plans and specifications designate the additional work to be done, and we request that you give us this additional information in writing before we can proceed.

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THE UNITED STATES VS. J. W. & J. C. MOORMAN

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EXHIBIT "F" TO PETITION

Oklahoma City, Oklahoma

June 22nd, 1942

The Austin Company,
Oklahoma City Aircraft Assembly Plant,
Oklahoma City, Oklahoma.

Attention: Mr. G. R. Brewer, General Superintendent

Re: Grading additional areas

GENTLEMEN:

On June 17th we wrote you in answer to your letter of June 17th regarding the grading west of the depot site.

We are in receipt of your letter of June 18th ordering the grading of areas 2 and 6.

As you know, previous to your letter we had not been grading area 6, and in our letter of June 17th we stated our reasons.

As requested in your letter of June 18th, we will grade area 6 as ordered; however, we do not abandon our position as set forth in our letter of June 17th and still contend that we have no contract for grading of this area as the plans and specifications do not show this to be within our contract.

We submit you have not complied with the request in our letter and as provided for in the contract and specifications in that you have not given us your decision in writing as to our contention. Will you please do this?

Yours very truly,

J. W. MOORMAN & SON,
By J. W. MOORMAN.

27

EXHIBIT "G" TO PETITION

July 6, 1942

The Austin Company,
Oklahoma City Aircraft Assembly Plant,
Oklahoma City, Oklahoma

Attention Mr. G. R. Brewer, General Superintendent

Re: Grading Additional Areas

GENTLEMEN:

May we chronologically detail the events regarding the grading of the additional areas?

On June 17, 1942, you requested that we proceed with the grading west of the depressed tracks and all areas as shown.

We answered by stating that we would do this; under protest, however. Our position was that our contract, plans and specifications did not cover the grading called for and stated in that letter that under Article 15 of the contract, as well as the amendment of the specifications, paragraph 216, we protested the above and requested that you promptly investigate the complaint and give us your decision in writing. In that letter we also requested a more defined statement as to where the work was to be done.

On June 18th you answered, ordering the grading of areas 2 and 6.

On June 22nd, we acknowledged receipt of that letter and agreed to do the work, not abandoning our position as set forth in our letter of June 17th, and still contending that we were under no contract for the grading of this area and requesting again that you investigate and give us your decision in writing.

To this date we have not been furnished with any answer to our letter, nor any decision in writing as to our contention.

We have proceeded and are doing at this time this additional work.

We are making a claim for this additional work, predicated on our consistent position that we have no contract for this work; that the contract and specifications that we have with your company do not cover the areas called for in your letter of June 18th.

It is our position that we have no contract as to this additional work and we will submit a claim therefor on a basis of 84¢ per c.y., which covers the additional work including overhaul and rock excavation and leave us at this time a profit over the actual cost.

Yours very truly,

J. W. MOORMAN & SON,

By — — —.

VJB-Mc.

EXHIBIT "H" TO PETITION

War Department

U. S. ENGINEER AREA OFFICE

Oklahoma City Aircraft Assembly Plant

P. O. Box No. 1945

2309 First National Building

Oklahoma City, Oklahoma

October 1, 1942

Refer to File No. OKP 316/93

29 Subject: Contract No. W-957-eng.-851—Claim No. 5—
Findings of Fact.

To: J. W. Moorman & Son,
P. O. Box, 1982,
Oklahoma City, Oklahoma

GENTLEMEN:

Reference is made to your letters dated June 17, June 22, July 6 and July 15, 1942, wherein you claim additional payment for work which you consider as being outside the requirements of your contract for Grading the Plant Site at the Oklahoma City Aircraft Assembly Plant, located approximately seven (7) miles southeast of Oklahoma City Oklahoma.

I have investigated the facts and my findings are as follows:

a. You were instructed by The Austin Company, as duly authorized representative of the Contracting Officer, to proceed with the grading within the bounds of Ranges 29/00 and 35/75 and stations 63/00 and 80/00. You were furnished a grading plan that designated this area as Grading Area No. 6.

b. Under the provisions of Article 15, "Disputes", of the contract and Paragraph 2-16, Claims, Protests and Appeals of the contract specifications, you may protest any work demanded of you which you consider to be outside the requirements of the contract.

c. You contend that, according to the plans and specifications, as stated in your above-mentioned letters, this area is not within the boundaries of the plant site as defined in paragraph 1-02,
30 and therefore, not a requirement of the contract. You are asking \$0.84 per cubic yard for excavation in this area, which you state covers additional work including overhaul, rock excavation and profit.

d. In direct consideration of this claim we bring to your attention incidents preceding the execution of the formal contract, ex-

cerpts from the Invitation for Bids, the Contract and the contract specifications.

(1.) At the time the drawing, Plot Plan G-3 was being prepared it was known by all concerned, that a taxiway was to be constructed and would be located near the East and West boundaries of the two government properties, the Oklahoma City Air Depot, at that time under construction, and the proposed Oklahoma Aircraft Assembly Plant, respectively. The exact location of this taxiway had not been determined. Since this plan was urgently needed for use with the Invitation for Bids in order to expedite the award of the grading contract, it was not deemed advisable to delay the issuance of said drawing until such time as the exact location of the taxiway could be determined. As the specifications for grading of the plant site provided for the grading of taxiways; to inform prospective bidders of the approximate location of this area for their investigation of the site, this taxiway area was located on the drawings at the proposed location and designated as Taxiway Proposed. The proposed location shown on the drawings proved to be the proper location as later determined. Revised drawings have designated this area as Taxiway "A".

31 (2) With the Invitation for Bids, dated March 26, 1942, Invitation No. 957-42-199 for grading of the plant site the proposed Oklahoma Aircraft Assembly Plant, specifications entitled Grading of Plant Site and drawing, Plot Plan G-3, were furnished.

(3) On the drawing, Plot Plan G-3, furnished with the invitation, there appeared red pencil markings that designated certain areas as included and not included, in grading of the plant site. The area shown on the drawing as Taxiway Proposed, was designated in red pencil as "Taxiway Grading Included In Grading Plant Site". The area shown on the drawing as Entrance "D" was designated in red pencil as "Not Included In Grading Plant Site". Entrances 'A', 'B' and 'C' were designated as "Not Included In Grading Plant Site". The areas designated on the plans as Taxiway Proposed and Entrance 'D' are not within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications. The areas designated as Entrances 'A', 'B' and 'C' on the drawings are within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications.

(4) A letter of Intent was issued to you on April 4, 1942, and it was accepted by you on April 7, 1942. In accordance with negotiations held with you on April 2, 1942, the United States of America placed an order with you to furnish the material and perform the work necessary for the construction and completion of approximately 1,000,000 cubic yards of grading (excavation) at the
32 site of the Oklahoma Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with specifications,

schedules and drawings, all of which were made a part thereof. It was contemplated that the Letter of Intent, Contract No. W-957-eng-851, would be supplemented by the execution of a formal contract at a later date.

(5) On April 9, 1942, you proceeded with the work in accordance with instructions contained in the Letter of Intent dated April 4, 1942. As contemplated, the Letter of Intent was supplemented at a later date by the execution of a formal contract, U. S. Standard Form No. 23, Revised, dated April 3, 1942, to which were attached drawings and specifications as referred to in Article 1 of the contract form. Plot Plan G-3, furnished with the formal contract did not bear red pencil markings; however, they clearly delineated the work to be done under the contract, including the Taxiway in question. You signed the contract and the drawings and returned them to this office. You took no exceptions to the contract or drawings.

In the specifications entitled Grading of Plant Site furnished with the formal contract the Scope and Nature of Work is provided as follows:

(6) Specifications—Section I—Special Provisions—Subparagraph 1-03 (b) "Nature of Work"—The work to be done under these specifications includes the furnishing of all labor, tools, equipment, materials and supplies necessary for grading of the plant site including the building sites, roads, aprons, taxiways, permanent parking
33 areas, disposal plant site and all other building site areas shown on the plans, all in accordance with the plans and these specifications.

(7) Specifications—Section II—Subparagraph 2-03(a) provides that it is the intent of the plans and specifications to describe a completed work to be performed under this contract. . . . no omission of any detail from the specifications shall release the Contractor from furnishing any material or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal

(8) Specifications—Section III—Technical Provisions—Paragraph 3-02 "Scope"—These specifications shall govern the grading of the temporary building sites, plant building sites, permanent parking areas, roads, taxiways, aprons, disposal plant site, and all other building sites and areas shown on the plans. The work shall include the furnishing of all labor, tools, materials, equipment and services necessary to perform all grading, grubbing, excavation, embankment and embankment compaction required to complete the grading in accordance with the plans and specifications.

(9) Paragraph VI of the Invitation provides . . . Prospective bidders or their authorized agents are expected to examine the plans and specifications pertaining to the work; to visit the site of the work; to acquaint themselves with all available information,

including local conditions and the availability of labor, and to make their own estimate of the facilities and difficulties attending the execution of the work.

34 In evaluating the above-mentioned facts, it is found that:

a. In paragraph 7 of the Letter of Intent, dated April 4, 1942, provision was made for termination of the contract in the event the Government was unable to negotiate with you a satisfactory contract to supplement the Letter Contract. It is to be noted that the Letter of Intent was written for the reason that it was not practicable to delay commencement of work under the contract pending the preparation of a formal contract and full and complete specifications and drawings. The provision for termination mentioned above gave you an opportunity to take exception to the formal contract and/or completed specifications and drawings when they were delivered to you for examination and acceptance. The records disclose no exception to have been taken by you and that you did sign the formal contract and contract drawings. It must be presumed that you were willing and able to perform all work called for in said contract and drawings.

In view of the foregoing facts, I find that, because of the urgency of the construction program at the time your contract was negotiated, the contract drawings and specifications were not in a stage of completion, as evidenced by the necessity of marking blueprints with red pencil during the negotiations; that you entered into a Letter Contract to perform the work, subject to the provision that such contract would be terminated in the event the United States of America was unable to negotiate with you a satisfactory contract; that you examined and accepted a formal contract prepared subsequent to the date of the Letter Contract, which formal contract

35 included specifications and drawings which clearly require you to grade the Taxiway 'A' at the contract unit price of \$0.24 per cubic yard for excavation; and that you made no protest and took no exception to the formal contract, specifications and drawings at the time of your acceptance thereof.

Therefore, I find, that the work requested of you as set out in this claim is within the requirements of the contract and that the contract unit price bid is just compensation for the work performed. Accordingly, your request for additional payment is denied.

For your information, Article 15 of the contract provides for a method of appeal from decisions of the Contracting Officer, as follows: " * * * "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto."

The appeal, addressed to the Chief of Engineers, U. S. Army, Washington, D. C., shall contain all the facts or circumstances upon which the contractor bases his claim for relief and shall be presented to the Contracting Officer for transmittal to the Chief of Engineers, U. S. Army.

Very truly yours,

C. W. POWELL,
2d Lt., Corps of Engineers,
Acting Area Engineer.

EXHIBIT "I" TO PETITION

October 8, 1942

c/o V. J. Bodovitz,
1013 Colcord Bldg.,
Oklahoma City, Oklahoma

Chief of Engineers,
United States Army,
Washington, D. C.

Re: Contract No. W-957-eng-851

DEAR SIR:

Claim No. 5—Findings of Fact

Under date of October 1st the Acting Area Engineer makes findings of fact regarding claims for additional payment for work which contractor considers as being outside the requirement of the contract.

In this letter of October 1st the Acting Area Engineer for the first time acknowledges receipt of letters of June 17th, June 22nd, July 6th and July 15th, although Paragraph 2-16 of the specifications states "the Contracting Officer shall thereupon promptly investigate the complaint and furnish the contractor his decision thereon in writing". Here the prompt investigation and the decision thereon in writing was given long after the contractor had completed the work.

Paragraph 1-02 describes "Location" as follows:

"The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N., Range 2 West (2 W), of the I.M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma."

37 We submit that is controlling and complete answer to the findings set forth in five pages of the letter of October 1st.

It is true the original plan had written on it "Taxiway (Proposed)".

It also had on it indications of various buildings, various water wells and various highways, and if the position is well taken, then likewise this contractor could have been required to have built these buildings, constructed the highways or drilled the water wells. It is far fetched to contend that a proposed taxiway clearly outside of the area involved in the contract comes within the purview of the contract.

Furthermore, there is one other provision that is conclusive. In the contract as signed, Article 2 reads as follows:

"In Case of Difference Between Drawings and Specifications, the Specifications Shall Govern".

The contractor has never had furnished to him, either at the time of the original negotiations or any time subsequent thereto, any plans or drawings with any pencilled notations thereon; and furthermore, states that he never saw any such plans at any time other than at the Field Office of the Assistant Area Engineer long after the work had started and the contract was signed.

In paragraph (5), page 3, comment is made that the contractor signed the contract and the drawings and returned them without taking exceptions to the contract and the drawings. This, we submit, is begging the question. The whole matter and dispute is as to whether the drawings and contract designated the taxiway. The contract, as we just above stated, and specifications expressly omitted any areas other than those expressly and implicitly set forth in the specifications, and it is assuming the very matter in controversy to make the statement that the contractor took no exceptions. Of course he took no exceptions, because he had a right to rely upon the statement in the contract that in case of difference between drawings and specifications, the specifications shall govern; furthermore, there was nothing on the drawings themselves to indicate that he would be required to do this work. The words "proposed taxiway" certainly could cause no more notice of an obligation to do this work than the word "water wells" or "building" on the drawings.

Also, it must be remembered that prior to the time of starting the work the contractor expressly took the position that this work was outside of the area called for in the contract.

It is interesting in passing to consider with these findings of fact on Claim 5 the findings of fact on Claim No. 7. Claim No. 7 covered an industrial road which was likewise outside of the area. The findings of fact in both instances arrived at the same result, to-wit: that they were contemplated in the contract. We submit that apparently these findings of fact were arrived at by taking the result and moving backwards. Because as to the taxiway the con-

tention is made that it was on the blue prints or drawings, but 39-40 in the industrial road case there was no such contention made, but nevertheless the same result was reached.

We submit, therefore, that all of the statements regarding the Invitation for Bids, the letter of Intent, and the drawings, are clearly beside the point and ignore the express provisions of the contract above referred to and the specifications above referred to, and we further submit that there is no tenable position for any finding that this contract covered excavation work outside of the limited areas as set forth in the plans and specifications.

Yours very truly,

J. W. MOORMAN & SON,
By

JWM-Mc.

41-42

GENERAL TRAVERSE—Filed July 2, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

WAS
EEE

(s.) FRANCIS M. SHEA,
Assistant Attorney General.

ARGUMENT AND SUBMISSION OF CASE

On June 2, 1948, the case was argued and submitted on merits by Mr. V. J. Bodovitz for plaintiffs, and by Mr. William A. Stern II for defendant.

43 Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.—Filed March 7, 1949

Mr. V. J. Bodovitz for the plaintiff.
Mr. William A. Stern, II, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

The plaintiff partnership entered into a contract with defendant for the grading of the site of the Oklahoma City Aircraft Assembly Plant. It alleges that defendant required it to perform grading and excavation not called for by the contract, the specifications or the drawings. The contracting officer and the head of the department interpreted the contract as including the work in question, and plaintiff was paid for such work at the contract unit price of 24 cents per

cubic yard. Plaintiff seeks to recover \$179,323.80 as payment for grading 298,973 cubic yards at 84 cents per cubic yard, less 24 cents per cubic yard already paid. Because of a renegotiation agreement entered into by plaintiff and defendant, plaintiff's recovery may not exceed \$117,916.51, plus interest computed thereon.

Defendant contends (1) that the work in question was within the terms of plaintiff's contract and that it has been fully paid therefor; and (2) that the decision of the head of the department was final and conclusive.

SPECIAL FINDINGS OF FACT

1. Jeff W. Moorman and James C. Moorman are copartners doing business as J. W. Moorman & Son, in Oklahoma City, Oklahoma.

44 March 26, 1942, the defendant, acting through the Corps of Engineers, War Department, sent to a number of prospective bidders, including plaintiff, Invitation for Bids No. 957-42-199, for the "Grading of Plant Site, Oklahoma City Aircraft Assembly Plant." Accompanying each invitation was a set of specifications and certain plans, designated as Location Map G-1 and Plot Plan G-3. These plans were drafted March 2, and March 6, 1942, respectively, and Location Map G-1 was approved by the office of the Chief of Engineers March 20, and Plot Plan G-3 was approved March 26, 1942. On the drawing, Plot Plan G-3, the defendant at some time, not appearing from the record, made certain red pencil markings which designated areas outside of the Aircraft Assembly Plant site as included and certain areas within such site as not included in the grading and excavation work for the Aircraft Assembly project. The plot plan drawing G-3 furnished to plaintiff with the invitation for bids and with the contract subsequently made, did not have on it such markings, nor was any reference made to such changes in this drawing in the contract, and plaintiff had no knowledge of any intention by defendant to make such changes in this drawing until long after the contract had been made.

2. The specifications furnished plaintiff with the invitation, and later incorporated in its formal contract, without material change, contained the following provisions in Section I, Special Provisions, with respect to the location and property description, nature and order of the work:

1-02. *Location.*—The plant site to be graded in accordance with the plans and these specifications is located in the SE $\frac{1}{4}$ of Section 14 and the east half (E $\frac{1}{2}$) of Section 23, Twp. 11 N., Range 2 west (2W), of the I. M., approximately seven (7) miles southeast of the business district of Oklahoma City, Oklahoma.

1-03. *Work to be done.*—

• • • • • • •

(b) *Nature of work*—The work to be done under these specifications includes the furnishing of all labor, tools, equipment, materials and supplies necessary for the grading of the plant site including the building sites, roads, aprons, taxi-ways, permanent parking areas, disposal plant site and all other building site areas shown on the plans, all in accordance with the plans and these specifications.

1-04. *Order of work*.—Work shall be carried on at the location, and in the sequence specified herein or as directed by the Contracting Officer. The work shall be constructed in every part in exact conformity with the location and limit marks established by the Contracting Officer. The grading work under this contract shall begin in the area designated for the temporary building sites and shall be prosecuted with the greatest possible speed. Work at the north end of the plant site may be carried on concurrently and must be next in the order of work.

Paragraph 1-15 of the Specifications related to the drawings and provided:

1-15. *Drawings*.—

(a) *General*.—The work shall conform to the following drawings entitled "Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma," with subjects and file numbers as follows:

<i>Subject</i>	<i>File Number</i>
Location Map	G1
Plot Plan	G3

The above drawings form a part of these specifications. The originals are on file at the office of The Austin Company, Skirvin Tower Hotel, Oklahoma City, Oklahoma.

Plot Plan G-3 showed certain areas adjacent to the main Aircraft Assembly Plant and the aircraft hangar building which were to be graded for hard surfacing, and which areas fully answered the description of "taxi-ways" mentioned in paragraph 1-03 (b), above. This plan definitely indicated a "taxi-way" 400' x 50' leading to the Compass Checking Station. Plan G-3 also showed, among other things, that the Assembly Building was to be 3,220 feet long and varying in width from 726½ feet at the north end down to 150 feet at the south end. Adjacent to the south half of this building was shown on the east side an area to be graded for hard surfacing with "Asphaltic Concrete" for a length of 2,800 feet and a width of

100 feet. This strip was shown as leading to and connecting with the 400' x 50' concrete taxi-way leading to the Compass Checking Station, about 1,100 feet southeast of the Assembly Building. Likewise, this plan showed certain adjacent areas to the west 900 feet long and south of the south end of the Assembly Building 950 feet long, which were to be graded for hard surfacing with asphaltic concrete. While none of these areas was specifically marked on the plan as "taxi-ways," it was obvious from the drawing and the kind of plant to be erected on the site to be graded, that they were intended for use as "taxi-ways," in moving aircraft assembled in the Assembly Building to the Compass Checking Station and to the aircraft Hangar, 763' x 200', and the Paint Shop, shown on the plan as being located about 450 feet southwest of the south end of the Assembly Building. Adjacent to the aircraft Hangar and the Paint Shop was an area to be graded which was 1200' x 250' and designated on the drawing as "Concrete Apron."

Location Map G-1 is a blueprint, showing several miles of the area surrounding the "Aircraft Assembly Plant" and the "Midwest Air Depot," and the location of the assembly plant site thereon conforms exactly to the range and section description contained in the above quoted paragraph 1-02 of the specifications.

Plot Plan G-3 is a detailed drawing of the assembly plant site showing Range 29 as the west boundary line by the words "property line." North of Station 80+ is a line marked as the north property line. The south and east limits of the project are similarly marked.

The specifications related specifically to the work to be performed on the Aircraft Assembly Plant site and no mention was made anywhere in the specifications of the Midwest Air Depot to the west of the Assembly Plant site. The drawings G-1 and G-3 furnished to plaintiff indicated by the detailed information shown thereon, that they were prepared for the purpose of indicating the grading and excavation work to be performed on the Aircraft Assembly site in accordance with the specifications, and that they were not intended to include in connection with such work any grading or excavation within the Midwest Air Depot site or in any areas outside of the property lines of the Aircraft Assembly Plant shown thereon.

3. Prior to making its bid, plaintiff visited the site of the project with the specifications and drawings in its possession and observed that west of the Assembly Plant property line (at Range 29) and separated from it by a wire fence, was an air depot and air-field, another Government project then under construction. Guards were posted at intervals along the fence and plaintiff saw that some grading work was then being done on the air depot site. Plaintiff's Plot Plan G-3 showed a small portion of the air depot (designated as Midwest Air Depot) and indicated in general

certain installations thereon, including airfield runways with connecting and parallel taxiways. This plot plan also showed a road north and east of the Assembly Plant west property line and leading to Entrance D of the assembly plant site. From a reading of the specifications and drawings and an examination of the site, plaintiff interpreted the specifications and drawings as calling only for the performance of the grading work shown within the Aircraft Assembly Plant site, and made its bid accordingly. This interpretation by plaintiff of the specifications and plans furnished to it by defendant was, in every way, reasonable. Plaintiff made no actual inspection outside the plant site limits as defined in paragraph 1-02 of the specifications and as indicated by the four "property line" boundaries marked on Plot Plan G-3, and by the cross-hatched area on Location Map G-1.

4. The specifications estimated that the quantity of grading to be done in the assembly plant area under the proposed contract would be approximately 1,000,000 cubic yards, and plaintiff concluded that this estimate was substantially correct. Plaintiff submitted a bid of 24 cents per cubic yard which was accepted by defendant. On April 4, 1942, defendant sent to plaintiff a "Letter Contract" which was accepted by plaintiff on April 7. On April 9, 1942, plaintiff commenced work and, about June 1, 1942, plaintiff and defendant executed a formal contract effective as of April 3, 1942.

5. The formal contract, in all respects pertinent to plaintiff's claim, followed the form of U. S. Standard Form No. 23, Revised, including the standard Articles 3, 4 and 5, covering changes, changed conditions, and extra work, and the standard Article 15 providing for determination of all disputes concerning questions of fact by the contracting officer, subject to written appeal within 30 days.

6. Pursuant to paragraph 2-09 of the specifications, the Austin Company was designated Architect-Engineer-Manager (hereinafter referred to as A-E-M) with full authority to act for the contracting officer in supervising plaintiff's work under the contract, and directing its operations.

7. The specifications also contained in paragraph 2-16 the usual provision with reference to "Claims, Protests and Appeals." This paragraph, as it appeared in the original specifications, provided for appeal to the Chief of Engineers, U. S. Army, as the head of the department, and referred to Article 15 of the Contract. The only change made in the substance of this paragraph when the contract was prepared and signed, was the provision that all appeals should be taken and addressed to the Secretary of War instead of the Chief of Engineers. Before as well as after it was changed, the paragraph contained the provision that "If the contractor is not satisfied with

the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract."

Section III, entitled "Technical Provisions, Grading Plant Site," relating to clearing, grubbing, disposal of materials, stripping, excavation, embankment work, finishing, and measurement for payment, contained the following paragraph:

3-02. *Scope*.—The specifications shall govern the grading of the temporary building sites, plant building sites, permanent parking areas, roads, taxiways, aprons, disposal plant site, and all building sites and areas shown on the plans. The work shall include the furnishing of all labor, tools, materials, equipment and service necessary to perform all grading, grubbing, excavation, embankment and embankment compaction required to complete the grading in accordance with the plans and specifications.

8. June 17, 1942, defendant, through the A-E-M, wrote plaintiff, as follows:

In accordance with our verbal instructions and your Contract Specifications, Section 1—Special Provisions, Paragraph 1-12 on Quantities, Paragraph 1-15 on Drawings, and Article 2 of your Contract, you are to proceed with the grading west of the depressed tracks and with all areas as shown.

49 9. On the same date, plaintiff wrote defendant, as follows:

Acknowledging receipt of your letter of June 17th, 1942, requesting that we proceed with the grading west of the depressed tracks and all areas as shown.

We will do this work as requested; doing some, however, under protest.

It is our position that our contract, plans and specifications do not cover the grading called for.

Section 1-02 of the specifications lists the plant site to be graded and describes same, and the area now called for in your letter for grading is outside this location. Therefore it is our position that we do not have a contract covering this additional work called for.

Under Article 15 of the contract, as well as the amendment of the specifications, paragraph 2-16, we submit our protest as above and request that you promptly investigate our complaint and give us your decision in writing.

• • • • •

P. S.—Neither your letter nor the plans and specifications designate the additional work to be done, and we request that you give us this additional information in writing before we can proceed.

10. June 18, 1942, defendant replied, as follows:

You are hereby ordered to go on grading areas Nos. 6 and 2. Grading area No. 6 identified from Range 29+00 to Range 35+75; Station 63+00 to Station 80+00.

Grading area No. 2 identified from Range 12+00 to Range 29+00; Station 55+00 to 68+00.

Grading area No. 6 is needed at the earliest possible date for the erection of concrete plant for Leo Saunders Construction Company.

Attached, herewith, is Grading G-3 Plot Plan, subdivided into ten grading areas.

11. Grading Area No. 6 as shown on the subdivided plot plan sent to plaintiff by defendant with the above-quoted order, covered a portion of the taxiway in the "Midwest Air Depot" west of Range 29 and extended west to the edge of the Air Depot North-South concrete runway. Subsequently, plaintiff was required under the order to grade all of the taxiway. This grading took plaintiff about 1,400 feet beyond the northern boundary of the "Aircraft Assembly Plant" and some seven hundred feet west of Range 29 for the entire length of the Midwest Air Depot taxiway.

50 During the course of the contract performance, defendant eliminated some of the grading that had been contemplated by both parties on the assembly plant site south of the temporary building site, but there is no issue concerning this.

12. June 22 and July 6, 1942, plaintiff wrote to the A-E-M renewing its request for an investigation of its complaint as set forth in its letter of June 17, 1942, and a decision, pursuant to Article 15 of its contract and paragraph 2-16 of the specifications. On July 15, 1942, plaintiff again wrote to the A-E-M, as follows:

We are herewith submitting Claim #5 for yardage moved under protest which we contend is out of the bounds of our contract west of Range 29 better known as Taxiway. This yardage amounts to 123,322 C. Y. We are asking as you have been notified in writing, 84¢ per C. Y. which amounts to \$103,590.48. This includes rock excavation and overhaul which we feel is not unreasonable.

13. Plaintiff duly completed its contract and the Government duly accepted the work but paid plaintiff only the original contract price of 24 cents per cubic yard for all excavation.

14. October 1, 1942, defendant's Acting Area Engineer rendered a decision adverse to plaintiff's claim. This decision read, in part, as follows:

d. In direct consideration of this claim we bring to your attention incidents preceding the execution of the formal contract, excerpts from the Invitation for Bids, the Contract and the contract Specifications.

(1) At the time the drawing, Plot Plan G-3, was being prepared it was known by all concerned, that a taxiway was to be constructed and would be constructed and would be located near the East and West boundaries of the two Government properties, the Oklahoma City Air Depot, at that time under construction, and the proposed Oklahoma Aircraft Assembly Plant, respectively. The exact location of this taxiway had not been determined. Since this plan was urgently needed for use with the Invitation for Bids in order to expedite the award of the grading contract, it was not deemed advisable to delay the issuance of said drawing until such time as the exact location of the taxiway could be determined. As the specifications for grading of the plant site provided for the grading of taxiways; to inform prospective bidders of the approximate location of this area for their investigation of the site, this
51 taxiway area was located on the drawings at the proposed location and designated as Taxiway Proposed. The proposed location shown on the drawings proved to be the proper location as later determined. Revised drawings have designated this area as Taxiway "A".

(2) With the Invitation for Bids, dated March 26, 1942, Invitation No. 957-42-199 for grading of the plant site of the proposed Oklahoma Aircraft Assembly Plant, specifications entitled Grading of Plant Site and drawing, Plot Plan G-3, were furnished.

(3) On the drawing, Plot Plan G-3, furnished with the invitation, there appeared red pencil markings that designated certain areas as included and not included, in grading of the plant site. The area shown on the drawing as Taxiway Proposed, was designated in red pencil as "Taxiway Grading Included in Grading Plant Site." The area shown on the drawing as Entrance "D" was designated in red pencil as "Not Included In Grading Plant Site". Entrances "A", "B", and "C" were designated as "Not Included in Grading Plant Site". The areas designated on the plans as Taxiway Proposed and Entrance "D" are not within the bounds of the location of the plant site as set out in paragraph 1-02 of the specifications.

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* * * Plot Plan G-3, furnished with the formal contract did not bear red pencil markings; however, they clearly delineated the work to be done under the contract, including the Taxiway in question. You signed the contract and the drawings and returned them to this office. You took no exceptions to the contract or drawings.

* * * * *

In view of the foregoing facts, I find that, because of the urgency of the construction program at the time your contract was negotiated, the contract drawings and specifications were not in a stage of completion, as evidenced by the necessity for marking blueprints with red pencil during the negotiations; * * * that you examined and accepted a formal contract prepared subsequent to the date of the Letter Contract, which formal contract included specifications and drawings which clearly require you to grade the Taxiway "A" at the contract unit price of \$0.24 per cubic yard for excavation; and that you made no protest and took no exception to the formal contract, specifications, and drawings at the time of your acceptance thereof.

52 Therefore, I find, that the work requested of you as set out in this claim is within the requirements of the contract and that the contract unit price bid is just compensation for the work performed. Accordingly your request for additional payment is denied.

15. On the same date, October 1, 1942, defendant's Acting Area Engineer rendered another decision on plaintiff's claim 7, relating to the grading of an industrial road within the Midwest Air Depot area and which work plaintiff claimed was not required under their contract for grading the assembly plant site. This decision was likewise adverse to plaintiff's claim.

16. October 8, 1942, plaintiff appealed from the denials of its claims to the Secretary of War, stating, in part:

It is true the original plan had written on it "Taxiway (Proposed)".

It also had on it indications of various buildings, various water wells and various highways, and if the position is well taken, then likewise this contractor could have been required to have built these buildings, constructed the highways or drilled the water wells. It is farfetched to contend that a proposed taxiway clearly outside of the area involved in the contract comes within the purview of the contract.

* * * * *

The contractor has never had furnished to him, either at the time of the original negotiations or any time subsequent thereto, any plans or drawings with any pencilled notations thereon; and furthermore, states that he never saw any such plans at any time other than at the Field Office of the Assistant Area Engineer long after the work had started and the contract was signed. [Plaintiff first saw the red pencilled plans when the written order of June 18, 1942, was issued.]

* * * * *

It is interesting in passing to consider with these findings of fact on Claim 5 the findings of fact on Claim No. 7. Claim No. 7 covered an industrial road which was likewise outside of the area. The findings of fact in both instances arrived at the same result, to wit: that they were contemplated in the contract. We submit that apparently these findings of fact were arrived at by taking the result and moving backwards. Because as to the taxiway the contention is made that it was on the blue-prints or drawings, but in the industrial road case there
53 was no such contention made, but nevertheless the same result was reached.

7. Plaintiff's claims were referred to the War Department Board Contract Appeals. On January 20, 1944, that Board rendered decision adverse to plaintiff with respect to its claim for grading Midwest Air Depot taxiway. This opinion contained no mention of the blueprint Plot Plan G-3 marked in red. In its opinion Board stated:

As counsel for appellant has raised some question about the power of this Board to pass on questions of law, although, apparently, he is not averse to a decision by the Board, it may be well to state, that in cases of contracts, such as the present, containing a Claims, Protests and Appeals clause, the Board has adopted the policy of deciding questions of law. In the present case, the controversy falls directly under the first sentence of that clause, which reads: "If the contractor considers any work demanded of him to be outside the requirements of the contract * * *." That is just the contention here—that the grading of the taxiway is outside the requirements of the contract. Under the Claims, Protests and Appeals clause, a ruling by the contracting officer upon that question, adverse to appellant, is an appealable ruling. For the reasons given the appeal will be considered on its merits.

There is no escape from the conclusion that the grading contemplated by the contract includes the grading of the taxiway. Specifications 1-03 (b) and 3-02 giving the nature and

scope of the work both use the word "taxiways". Plan G-3 uses the word "Taxiway (proposed)". Article I specifically provides that the specifications and the plans set out in Spec. 1-15 shall govern the work.

Regardless of what appellant may have had in mind originally as to the taxiways, there is no question about the fact that the contract was signed with these provisions and this plan as a part thereof, and no exception was made as to that particular grading.

It is appellant's theory, however, that special condition 1-02 (par. 3 above) is a limitation of the area in which appellant was to work, and that anything outside that area is extra work. The Board does not agree with that interpretation. "Location" is merely a means of identifying the project, and not of limitation upon the scope of the work. Were it possible to show that no part of the present project was in the sections of
54 land designated, there might be a good argument that it was not the project covered by this contract; but that is not the fact here. "Location" answers the question "Where?", not the question "How much?".

18. June 27, 1944, the Board rendered its opinion on plaintiff's appeal with respect to the industrial road grading and reversed the decision of the contracting officer. In its opinion the Board referred to the opinion of January 20, 1944, relative to the taxiway and approved that portion of the opinion interpreting paragraph 1-02 of the specifications "Location". In sustaining plaintiff's appeal on the road claim, the Board distinguished the two cases as follows:

However, there are other considerations brought forth in the hearing on this appeal that do give light on what the intention of the parties was with regard to the grading of this "industrial road." We find that the Government, in requesting bids on this project, definitely indicated on Drawing G-3, the Plot Plan for this particular grading project, that the grading of this "industrial road" (noted as Entrance 'D' on the drawing) was not to be included in the bids.

At this point the Board quoted from the opinion of the Chief of Engineers finding that plaintiffs had received drawings marked with a red pencil at the time of the Invitation for Bids, and said:

Although the appellant denies having seen this particular drawing with the notations above mentioned upon it, and the Drawing G-3 attached to the formal contract did not have on it these notations; nevertheless, such expressions do show the

intention of the Government relative to the grading work to be done on this project at the time bids were requested.

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All of these circumstances above related, considered in the light of the uncertainty of the specifications and drawings, indicate to the Board that neither party intended at the time the contract was entered into that the appellant would be required to grade the "industrial road" site, and, therefore, the requirement by the contracting officer that the appellant grade this "industrial road" site was extra work not originally contemplated by either party, and the appellant is entitled to be paid a reasonable sum for this work.

19. July 24, 1944, defendant and plaintiff entered into a Supplemental Agreement (Modification No. 9) to cover the grading of the "Industrial Road" at a unit price of 60 cents per cubic yard for 13,676 cubic yards. Plaintiff had been paid for such yardage at the unit price of 24 cents. As a result of this supplemental agreement, plaintiff was allowed \$8,205.60 and paid an additional \$4,923.36. No part of this amount is now in controversy.

20. Plaintiff graded 298,873 cubic yards outside of the Aircraft Assembly Plant area and west of range 29. This grading included the Midwest Air Depot taxiway and excavation in connection with drainage ditches for the drainage of such taxiway.

21. The soil in the Midwest Air Depot area on the west side of Range 29 contained more rock than did the soil on the assembly plant site. It was necessary for plaintiff to drill and blast rock in order to do grading and excavation work west of Range 29.

22. The cost of performing the work west of Range 29, exclusive of overhead and profit, but including a reasonable amount for rental of equipment, was \$158,235.94 consisting of the following items.

Itemized Cost

Equipment rental	\$75,413.99
Labor	43,661.22
Gas, oil, fuel and grease	4,332.00
Supplies and Parts	16,359.00
Shop, repair and maintenance	9,120.00
Insurance, social security and unemployment Comp	7,211.48
Dynamite and blasting supplies	2,138.25

\$158,235.94

The actual cost per cubic yard for grading west of Range 29 was approximately 53 cents. Allowing a reasonable 12 percent for profit and overhead, plaintiff is entitled to 59.3 cents per cubic yard for grading 298,873 cubic yards west of Range 29, or \$177,231.69. Plaintiff has already been paid for this yardage at the rate of 24 cents per cubic yard, or a total of \$71,729.52, leaving a balance of \$105,502.17 due and unpaid.

CONCLUSION OF LAW

Upon the foregoing special findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover \$105,502.17.

It is, therefore, adjudged and ordered that plaintiffs recover of and from the United States the sum of one hundred five thousand, five hundred and two dollars, and seventeen cents (\$105,502.17).

OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff partnership, J. W. Moorman & Son, seeks to recover the sum of \$117,916.51 as an additional payment alleged to be due for extra work involving the grading and excavation of 298,973 cubic yards of earth and rock, from an area within a project known as the Midwest Air Depot which plaintiff says was outside the scope of its contract of April 3, 1942, with defendant for certain grading work for the Oklahoma City Aircraft Assembly Plant.

This work was performed as a result of a written order duly issued by the contracting officer June 18, 1942, which plaintiff duly protested in accordance with paragraph 2-16, General Provisions, of the contract specifications. Plaintiff claimed that the work covered by the written order was not called for by its contract; that it was more expensive to perform by reason of its nature and the circumstances and conditions under which it had to be done; and that a price of 84 cents a cubic yard should be paid therefor instead of the original contract unit price of 24 cents.

As shown in finding 14, the contracting officer denied the claim principally on the ground that defendant had made certain red pencil changes on a drawing, known as Plot Plan G-3, which he asserted had been furnished to plaintiff with the invitation for bids (but which plaintiff strenuously denied), showing that the work in question was to be included in the contract for the grading of the aircraft assembly plant site. In addition, the contracting officer resolved all doubts in favor of the Government and reached the conclusion that independently of the red markings in plan G-3, the specifications and original drawings were sufficient to show that the grading and excavation work performed out-

side the Aircraft Assembly Plant site and within the Midwest Air Depot area was to be included within contract for grading the assembly plant site.

After a hearing on plaintiff's appeal, the Board of Contract Appeals, acting for the Secretary of War, affirmed the decision of the contracting officer as to the claim now before the court, and denied plaintiff's claim. In its opinion on this claim (finding 17) the Board did not discuss the changed drawing alleged to have been sent to plaintiff with the invitation for bids and denied the claim on its interpretation of the specifications and original drawings. In a separate opinion on another item of plaintiff's claim for grading an industrial road from a point in the Midwest Air Depot site to entrance "D" of the Aircraft Assembly Plant site, the Board reversed the decision of the contracting officer and concluded that this work had not originally been contemplated by either party. For this extra work, which involved 13,676 cubic yards, plaintiff was allowed 60 cents a cubic yard by the contracting officer.

We are of the opinion that the decisions of the contracting officer and the head of the department cannot be sustained under the facts and the specifications and drawings.

The defendant conceded at the hearing of the case in this court that plaintiff never received the drawing marked in red to indicate that the taxiway and connecting areas, which were a part of the airfield, known as Tinker Field, at the Midwest Air Depot, were to be included in the contract for grading the Aircraft Assembly Plant site. It contends, however, that plaintiff may not recover any additional amount for this work on the ground that the contract clearly required plaintiff to grade the taxiway west of Range 29, because the word "taxi-ways" was used in the specifications in paragraph 1-03 (b), Nature of Work, and in paragraph 3-02, Scope, and the only taxiway designated on the drawings was the one plaintiff was required to grade west of Range 29. Defendant further contends that, in any event, the decisions of the contracting officer and the War Department Board of Appeals to the effect that the work in question was not outside the contract requirements, were final.

58 We cannot agree with defendant's contention that the contract documents clearly require plaintiff to grade the taxiway west of Range 29. Paragraph 1-02 of the specifications (finding 2) describes exactly the limits of the assembly plant site and Location Plan G-1 and Plot Plan G-3, conform exactly to that description as to the assembly plant site. The specifications are designated as "Specifications For Grading of Plant Site, Oklahoma City Aircraft Assembly Plant," and nowhere therein is the Midwest Air Depot airfield mentioned. The fact that Location Plan G-1 showed all of the Midwest Air Depot and airfield site and that Plot Plan G-3, which

was a detail drawing with reference to the assembly plant, was extended west of the assembly plant site so as to show a part of the Midwest Air Depot and airfield, was not sufficient, in view of the provisions of the specifications and other information shown on Plan G-3, to put plaintiff on notice that it would be required or called upon to perform work outside the assembly plant site. Plaintiff so interpreted the specifications and drawings and we have found that its interpretation was reasonable and proper. The changes which defendant found necessary to make in red on drawing G-3 (not furnished to plaintiff) in order to show that certain grading west of Range 29 was to be included in the plant site grading work, support plaintiff's interpretation of the original drawings. The original drawings G-1 and G-3, furnished to plaintiff, were approved by the defendant's district engineer and contracting officer on March 20 and 26, 1942, respectively, and obviously they were intended to conform to the specifications. The invitation for bids was sent out on March 26, 1942.

Paragraph 1-02 specifically defines the boundaries of the plant site and the next paragraph 1-03 (b), Nature of Work, provides that the work to be done under the specifications includes the furnishing of all labor, equipment, etc., necessary for the "grading of the plant site,"—not some other plant site or some other project far or near—"including building sites, roads, aprons, taxiways, permanent parking areas, disposal plant site, and all other building site areas shown on the plans." Plan G-3 designates by name everything mentioned in paragraphs 1-02 and 1-03 (b), except "taxi-ways." However, we think the absence on this drawing of any specific designation of "taxi-ways" mentioned in 1-03 (b) is unimportant, first, because a large plant for assembling airplanes would normally need taxiways within the site to be graded; and, second, because taxiways in the sense in which that term must have been used in paragraph 1-03 (b), Special Provisions, and in paragraph 3-02, Technical Provisions, are clearly shown on drawing G-3 as we have set forth in finding 2. On this plant site the drawing G-3 shows, among other buildings, a large aircraft Assembly Building; some distance southeast thereof is the Compass Checking Station, and some distance west of the compass station and southwest of the Assembly Building are located a large aircraft Hangar and Paint Shop. Plan G-3 clearly shows grading work to be performed for concrete and asphaltic concrete surfacing of these areas, extending along the east and west of the Assembly Building to the other points and buildings mentioned, and between the Compass Checking Station and the Hangar. A certain strip adjoining the Hangar is designated as "Concrete Apron." The other areas mentioned are not designated on the Plan G-3 otherwise than as "Concrete" or "Asphaltic Concrete," but it seems clear enough from a

proper reading of this drawing that it intended to show these areas as "taxi-ways" for moving planes assembled in the Assembly Building to the Compass Checking Station, to the Hangar and Paint Shop, and to the parking areas.

In the circumstances of this case we cannot interpret the word "taxi-ways," as used in paragraph 1-03 of the specifications relating to the assembly plant site, as meaning that the contractor grading that site must also do extensive grading and excavation of ditches for an airfield taxiway 6,600 feet long and 100 feet wide for the existing airfield on the Midwest Air Depot site, some distance west of the assembly plant site. Such an interpretation would, we think, be an unreasonable one. If the description and boundaries set out in paragraph 1-02 and the boundaries shown on Plan G-3, marked "Property Line," could not be relied on, there was then no discernible limit to what the Government intended except its own interpretation. Cf. *Callahan Construction Co. v. United States*, 91 C. Cls. 538, 611; *W. H. Armstrong and Company v. United States*, 98 C. Cls. 519, 527; *John K. Ruff v. United States*, 96 C. Cls. 148, 164. We think there was no reason for plaintiff to suppose, as defendant argues there was, that the Midwest airfield taxiway in question, and shown on the plans, was a necessary part of the Assembly Plant project so that plaintiff should have inquired whether or not it would be required to grade it even though it was located off the plant site limits definitely fixed in the specifications.

We cannot agree with defendant's second argument that plaintiff is barred from recovering on the ground that the decisions of the contracting officer and the War Department Board of Appeals, acting for the head of the department, were final and conclusive by virtue of paragraph 2-16 of the specifications. A similar contention was considered and denied in the case of *E. and E. J. Pfozter v. United States*, 111 C. Cls. 184. The decisions in *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234, and *United States v. Blair*, 321 U. S. 730, cited by defendant, are not in point. Paragraph 2-16 is entitled "Claims, Protests and Appeals" and is primarily a procedural provision intended to provide an orderly method for carrying out the provisions and purposes of Article 15 of the standard formal contract. Such a paragraph in the "General Provisions" of the specifications has itself come to be a standard provision, and, as we pointed out in the *Pfozter* case, *supra*, the fact that the specifications, which are intended to delineate the work to be done and the procedures to be followed, are made a part of the contract by Article 1, does not warrant the conclusion that they override an express provision of the contract. Provisions such as paragraph 2-16 must, if possible, be read and interpreted in the light of and consistent with the provisions of the formal contract. When this is done, there is no conflict between Article 15 and paragraph 2-16.

The standard contract duly prepared and approved by the proper authority of the Government is binding upon the writer of specifications covering a specific project, and such contract provisions control unless they are modified or changed by a proper provision, approved by proper authority, inserted in the article of the contract provided for that purpose. Otherwise, the standard contract itself would be of little, if any, use, and the uniformity of understanding among contractors, contracting officers and others concerned, and the values flowing to the Government as well as to contractors by reason of such standard contract provisions, would not be obtained but would be left in a state of confusion and uncertainty. The history of the preparation and adoption of the standard forms of Government contracts shows that it was for reasons such as above mentioned, among others, that led to the adoption of the standard contract such as we have here.

We think the provision in paragraph 2-16 of the specifications that the decision of the Secretary of War on appeal " * * * shall be final and binding upon the parties to the contract," properly interpreted, means that such decision shall be final and binding to the extent provided in Article 15 of the Contract. Paragraph 2-16 of the original specifications provided that appeals from decisions of the contracting officer should be taken to the Chief of Engineers, U. S. Army, "whose decision shall be final and binding upon the parties to the contract," and stated that he had been designated by the Secretary of War to make "final decision." The paragraph also contained the statement—" (See Article 15 of the Contract.) "

When the formal contract was prepared for execution, the contracting officer inserted certain provisions under Article 22, entitled "Alterations", in which Articles 3, 9, 18 and 19 of the Contract were changed and a new Article 23, "Termination for the Convenience of the Government," was added. In addition, this article stated that the specifications were changed by adding thereto paragraph 2-26, changing paragraphs 2-19 and 2-16, and deleting paragraph 2-22. As re-written, paragraph 2-16 provided for appeals to the Secretary of War instead of to the Chief of Engineers, and left out the parenthetical reference to Article 15 of the contract. However, for the reasons above mentioned, we think the elimination of the reference to Article 15 did not have the effect of changing the substance and meaning of the original paragraph 2-16 as to the extent of the finality of the decisions of the contracting officer and the head of the department. We

62 are also of the opinion that the making of this change in paragraph 2-16 of the Specifications under Article 22, did not have the effect of changing in any way Article 15 of the Contract. This could only have been accomplished by expressly changing or deleting and rewriting Article 15, as was done with reference to certain other articles of the Contract.

The decision of the Board of Contract Appeals was based upon its interpretation of the contract documents which is not a question of fact within the meaning of Article 15. *Pfotzer v. United States, supra*. In view of the facts and for the reasons hereinbefore discussed, we hold that the Board and the Secretary of War erred in denying the claim here involved.

We conclude, therefore, that plaintiff's contract, specifications and drawings did not require plaintiff to grade the airfield taxiway on the Midwest Air Depot site west of property line Range 29, and that there was nothing in the contract, specifications, or drawings furnished to plaintiff to call plaintiff's attention, before it made its bid, to defendant's undisclosed intention to include the taxiway in question within the assembly plant site grading project.

There remains the question of damages.

Plaintiff contends that 84 cents per cubic yard is the proper measure of compensation for the grading west of Range 29. Defendant contends that 84 cents is excessive and that in any event plaintiff has failed to prove any damages. Plaintiff kept a record of its costs for this extra work as it was performed and introduced evidence showing its total actual cost for all the work done west of Range 29, exclusive of profit and overhead, in the amount of \$158,235.94 (finding 22). Defendant has no evidence to show that these costs were erroneous or excessive for the work done. This cost, without profit and overhead expense, amounts to about 53 cents a cubic yard which, we think, was reasonable in the circumstances. The defendant, however, takes exception in its brief to the amount of the item for equipment rental. Some of the machinery on which rental as a part of cost or compensation for the extra work was charged, was owned by plaintiff and some by the Government. The plaintiff paid a certain rental 63-64 rate to the Government for the machinery rented from it and charged the same rate on its books for machinery plaintiff owned and used for this work. Defendant objects to this procedure on the ground that there was no proof as to what plaintiff's ownership costs were nor how much of the total rental paid was paid to the Government for rental of its machinery. From the record we are convinced that the rental figures claimed by plaintiff for various items of machinery and equipment were fair and reasonable and that they were not more than the Associated General Contractor rates customarily charged. Defendant offered no evidence to support its contention that the rental rates were not reasonable.

Plaintiff's actual costs of \$158,235.94 do not include anything for overhead or profit. The actual cost per cubic yard for this extra work was approximately 53 cents. We believe that 59.3 cents per cubic yard, which would include a reasonable amount of 12 percent additional for overhead and profit, consti-

tutes reasonable and fair compensation to plaintiff for such work. In view of plaintiff's actual costs of performing certain grading work northwest of Range 29 and within the Midwest Air Depot site, which the War Department Board of Appeals held to be extra work outside of plaintiff's contract, the contracting officer paid plaintiff 60 cents a cubic yard. Accordingly, we are of opinion that plaintiff is entitled to recover \$105,502.17, representing the difference between \$177,231.69 (298,793 cu. yds. at 59.3 cents) and \$71,729.52 (298,473 cu. yds. at 24 cents), which plaintiff has already been paid.

Plaintiff claims interest, but interest is not allowable on the judgment at this stage of the case under Sec. 2516, U.S.C. Title 28, Revised.

Judgment will be entered in favor of plaintiff for \$105,502.17. It is so ordered.

Howell, *Judge*; Madden, *Judge*; Whitaker, *Judge*; and Jones, *Chief Judge*, concur.

65-66

JUDGMENT OF THE COURT—March 7, 1949

Upon the special findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover \$105,502.17.

IT IS THEREFORE ADJUDGED AND ORDERED that plaintiffs recover of and from the United States the sum of one hundred five thousand five hundred and two dollars and seventeen cents (\$105,502.17).

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Clerk's Certificate to foregoing transcript omitted in printing.

Supreme Court of the United States***Order allowing certiorari*****Filed October 10, 1949**

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.